NO. 22131

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INEZ ORTIZ-JIMINEZ,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in Counts One, Three, Five and Six of a Six-Count indictment following trial by the Court. (C.T. 12-14).[1/] Judgment of acquittal was granted as to Counts Three and Four as to appellant after the trial ended.

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 3231, 1324(a)(2) and 1324(a)(4). Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

1/ "C.T." refers to Clerk's Transcript.

II

STATEMENT OF THE CASE

Appellant was charged in each count of a Six Count Indictment returned on March 1, 1967 by the Federal Grand Jury for the Southern District of California, Southern Division, (C.T. 2-7). Counts One, Three and Five alleged, in effect, that on February 5, 1967 appellant in Tijuana, B.C., California, wilfully and knowingly encouraged and induced the entry into the United States at Imperial Beach, California, three different aliens named in each of the said three counts, and said aliens were not lawfully entitled to enter and reside within the United States, and thereafter appellant was first found in the Southern District of California.

Counts, Two, Four and Six alleged, in effect, that on February 5, 1967, within the Southern District of California, appellant transported the same three aliens knowing they were in the United States in violation of the law (C.T. 2-7) and having reasonable grounds to believe their entry into the United States occurred less than three years prior to February 5, 1967.

Appellant waived Jury (C.T. 10) and his trial on all six counts commenced and ended on April 7, 1967 before United States District Judge Raymond E. Plummer. (C.T. 11). Decision was reserved (C.T. 11) (R.T.89).[2/]

Thereafter on April 14, 1967 Judge Plummer filed a three-page document entitled "Findings of Fact and General Finding of Guilty", wherein he found appellant guilty as charged in Counts One, Three, Five and Six of the

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2/ "R.T." refers to Reporter's Transcript.

Indictment, and reaffirmed his order that Judgment of Acquittal be entered as to Counts Two and Four only. (C.T. 12-14).

Thirteen days later, on April 27, 1967, appellant filed a Notice of Motion for a new trial alleging, in substance, insufficient evidence and that appellant should then be allowed to explain his presence at the scene. Appellant did not allege newly discovered evidence. (C.T. 16-19). The Motion for a new trial was denied on April 28, 1967 and sentence was set for June 5, 1967. (C.T. 20).

On June 5, 1967 appellant was committed to the custody of the Attorney General for 30 days on each of Counts One, Three, Five and Six, to run concurrently making a total sentence of 30 days. (C.T. 21).

A Notice of Appeal was filed the same day, June 5, 1967. (C.T. 22).

III

ERROR SPECIFIED

Errors as alleged by appellant are paraphrased as follows:

1. Insufficient evidence.

2. Evidence as to a "rented house" should not have been admitted.

3. The Court should have granted a judgment of acquittal on grounds of insufficient evidence when appellant didn't testify.

IV

STATEMENT OF THE FACTS

On February 5, 1967, appellant was introduced in the outskirts of Tijuana, Baja, California, Mexico to Roberto Aguirre. (R.T. 61). Mr. Aguirre and four of his companions got in appellant's station wagon and was driven to the beach by appellant. On the way they stopped and picked up the guide (R.T. 62). This was after the other man told appellant they were all ready and everything was ready. Appellant told them to wait for him there. (R.T. 67). He returned with four others. Appellant's wife was with him, but he didn't see the children. (R.T. 63).

Arrangements had been made with another man for appellant to transport them to Los Angeles for $150.00. (R.T. 67, 70).

Mr. Aguirre thought appellant was the "Coyote." A coyote is "what they call a person who brings persons over here." (R.T. 71). Aguirre and nine others including the guide walked along the beach to where they were arrested. (R.T. 63).

They waded water and their clothes got wet. Appellant told them they were going to change clothes in a house. He didn't recall if the house was in Chula Vista or San Diego. (R.T. 64).

Mr. Albert S. Taylor, Senior Patrol Inspector describes the area along the beach between Chula Vista as a deserted area (R.T. 34) virtually barren country (R.T. 35) and he said all of the aliens were wet to their waists and above. (R.T. 52).

Inspector Taylor and 7 of his subordinates were keeping the "area under surveillance for possible smuggling activity" which they "had prior evidence of." (R.T. 14). They were waiting for the "aliens" to be picked up. (R.T. 15).

Appellant came along driving his own car, a 1958 Chevrolet Station Wagon. Appellant claimed it was his car and this was further verified by the registration. (R.T. 16). At about 9:00 p.m., appellant drove his car up on the parking lot, (R.T. 17) and backed his car around to the southwest edge of the parking lot (R.T. 19). One of the aliens left the group and came over and talked to Mr. Ortiz, as soon as he backed the car around to where they were hiding down in the breakwater rocks. Five others joined them. These six persons departed the area. Inspector Taylor stopped the vehicle and took these people into custody and determined they were aliens. (R.T. 20-21). He talked to them in Spanish. They appeared to be of Mexican descent. They had no papers or documents about their persons to indicate legal status in the United States (R.T. 23-24). He asked each alien if they had a legal document or not. (R.T. 55).

The guide-driver claimed to be here illegally also. (R.T. 44-45). Mr. Taylor said this was a common claim, hoping to be deported as a "plain wet." (R.T. 53).

Only about three cars were there and a few people were fishing "way out on the pier." (R.T. 39, 56-57).

Mr. Taylor concealed himself in appellant's automobile and had

the guide-driver return to the parking lot (R.T. 22). Mr. Taylor ordered the driver to return to the same spot and back-up, as before, where the remaining aliens were hiding (R.T. 24). The driver appeared purposely to go through the middle section and started back. Mr. Taylor "told him to pull over to the spot and he ignored me." At this point, appellant began whistling and "hollaring." At Mr. Taylor's instructions, the guide-driver then approached appellant near a taxicab in which his wife and child were already seated. (R.T. 47-48). Appellant said to the driver "Que paso?", meaning "What's going on?" Appellant could then observe Mr. Taylor, so he identified himself and placed appellant under arrest. (R.T. 49).

The aliens each had $100 to $150.00 on their persons and more. (R.T. 57).

Appellant was an "immigrated alien." (R.T. 58). His wife had a border crossing card. (R.T. 57).

Appellant was unemployed and resided in Tijuana. He paid $50.00 a month for a rented house in San Diego. He had rent receipts on his person, but they were returned to him. (R.T. 29-32).

One of the aliens, Mr. Aguirre, testified that he was told by appellant he could change his wet clothes in a house, but he couldn't recall whether the house was located in San Diego or Chula Vista. (R.T. 64). Mr. Aguirre referred to the area where he was picked up in appellant's station wagon as Chula Vista. (R.T. 59, 60, 64, 67, 68).

V

ARGUMENT

A. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JUDGMENT

Assuming such a motion was made, the rule in the Federal Court has long been that on appeal the evidence is viewed most favorable to the government.

Glasser v. United States, 315 U.S. 60 (1942)

The Statement of Facts set forth somewhat in detail the various facts that support the judgment. Some of the more potent circumstances are as follows:

Appellant transported the nine illegal aliens and the guide in Mexico just prior to their entry. (R.T. 62). In a short period of time he turned this same vehicle over to the guide in the United States, who transported the aliens. (R.T. 20). Appellant and his family were taking a taxi away from this location, (R.T. 47-48). He told Roberto Aguirre, they could change clothes at his house either in Chula Vista or San Diego. (R.T. 64). Appellant resides in Tijuana but has a house in San Diego. (R.T. 29). Appellant was surprised at the actions of the driver, when he refused to return to the spot where the four aliens were waiting. (R. T. 47-49).

Roberto Aguirre knew appellant as the "Coyote" and was going to pay him (R.T. 71). Appellant told Aguirre in Tijuana to wait at the beach and he returned shortly with the remaining 4 aliens. (R.T. 63).

Judge Plummer filed a Finding of Fact. (C. T. 12-13).

The Finding of Fact is substantiated by the record.

A Finding of Fact by the trial court shall not be overturned unless clearly erroneous.

Arellanes v. United States, 353 F.2d 270, 272 (9th Cir. 1965)

Williams v. United States, 289 F.2d 598 (9th Cir. 1961)

The Motion for a new trial was filed 13 days after the finding of guilt. (C. T. 16-19).

Appellant alleges no newly discovered evidence. To the contrary, he merely desires that he be able to testify as to the reasons for his presence at the scene in Imperial Beach. Surely appellant knew his reasons for being present during the trial.

Appellant's Motion for a new trial was therefore, not timely and the Court is without jurisdiction to grant a new trial. Rule 33, Federal Rules of Criminal Procedure.

Assuming the Motion were timely, denial of such Motion is within the discretion of the trial court and will not be reversed on appeal in absence of showing of abuse of discretion.

Morgan v. United States, 301 F.2d 272 (9th Cir. 1962).

Appellant claims the conviction should be reversed because the evidence is conflicting.

It is not for the reviewing Court to weight the evidence or to determine the credibility of witnesses.

Peek v. United States, 321 F.2d 934 (9th Cir. 1963) cert. denied, 371 U. S. 954.

The verdict is supported by substantial evidence.

B. EVIDENCE OF APPELLANT'S RENTED HOUSE WAS PROPERLY ADMITTED

After being advised of his constitutional rights, appellant admitted that he lived in Tijuana, had a rented house in San Diego and was unemployed, (R.T. 29-31) where the witness Aguirre was presumably being taken to change clothes before appellant transported him to Los Angeles.

The statement of appellant is clearly admissible as an admission.

The rent receipt had been returned to appellant. If he wanted it produced, he could have produced the document. The evidence rule, therefore, does not apply.

C. JUDGMENT OF ACQUITTAL SHOULD NOT HAVE BEEN GRANTED

No Motion for Judgment of Acquittal was made. (R. T. 79). Failure to make such a Motion constitutes a waiver of a claim of sufficiency of the evidence on appeal.

Robbins v. United States, 345 F.2d 930 (9th Cir. 1965)

At the close of the trial the following dialogue was recorded. (R.T.79).

Mr. Gott: "The Government rests, your Honor."

Mr. Corbin: "Your Honor, I would state to the Court that the defense rests at this time and would be prepared to argue the case at this

time without further evidence being presented."

Appellant contends such language constitutes a Motion for Judgment of Acquittal. The Court cannot so find.

See Bell v. United States, 282 F.2d 987, where it was said, "Although some may believe that judges ought to be endowed with prescient powers, none has yet suggested that they must be mind readers."

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the verdict of guilty in the Court below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Shelby R. Gott

SHELBY R. GOTT